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Supreme Court of the United States

October Term, 1971

No. 71-1315

HOWARD ALEXANDER, FRANK COLLIER, VILLAGE BOOKS, INC., MEDIA ARTS, AND GUILD PRESS, LTD.

Petitioners,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

RESPONSE OF RESPONDENT

OPINION BELOW

The opinion of the Supreme Court of Virginia is recorded in 212 Va. 554, 186 S.E.2d 43 (1972).

QUESTIONS PRESENTED

1. Is § 18.1-236.3, of the Annotated Code of Virginia repugnant to the Constitution of the United States of America by prohibiting a jury trial to determine obscenity and by permitting a prior restraint on literary material, and by providing for a city-wide community standard for judging obscenity rather than a national community standard, and by providing for establishing a fact, through civil pro-

ceedings, for use in criminal prosecution, all in violation of the First, Fifth, Sixth, Seventh, and Fourteenth Amendments to the Constitution of the United States of America?

2. Are the approximately 300 books and magazines, enjoined from sale by the Court below, obscene in the constitutional sense, without sale or exhibition to juveniles, obstrusive advertising or pandering?

STATEMENT OF THE CASE

On May 19, 1970, the Commonwealth's Attorney of the City of Portsmouth presented a petition to the Hustings Court asking that certain books named in the petition be adjudged obscene as set forth in § 18.1-236.3 of the Code of Virginia. The Hustings Court issued a writ of subpoena duces tecum returnable on May 22, 1970, at which time the appellants produced copies of the named books. A motion to quash the subpoena duces tecum was overruled and the books were left in the cutsody of the Court. On June 3, 1970, the Hustings Court issued a rule to show cause why the books should not be adjudicated obscene. On June 12, 1970, the appellants appeared through counsel and moved for a stay of the proceedings which was denied. The appellants filed an answer to the petition and a motion to dismiss the petition, which was heard by the Court on August 19, 1970. Following the denial of the appellants' motion to dismiss, the case was tried by the Court on November 4 and 5, 1970.

At the commencement of the trial on November 4, 1970, it was stipulated that the appellants' book store did not sell or distribute any literature to juveniles (T.3). In addition, the Court directed the return of those books which it had previously determined that there was no probable cause to believe they were obscene (T. 9). The first witness to testify

on behalf of the Commonwealth was Robert Holley, a resident of the City of Portsmouth for fifteen years (T. 6). Mr. Holley testified that five to seven years before he had served as chairman of an area wide Chamber of Commerce committee composed of representatives of Norfolk, Virginia Beach, Portsmouth, Newport News, Suffolk, and Nansemond County, the purpose of the committee being to investigate obscene matters in the area (T. 9 & 13). The committee purchased magazines from different locations throughout the community and by discussing the magazines with civic groups and organizations, the committee was able to determine what the community standard was throughout the whole area (T. 10). About a year and a half prior to trial, Mr. Holley did extensive investigation into obscenity in the Portsmouth area and by sampling contacted the equivalent of 30,000 people in the Portsmouth area (T. 10 & 13). During this time Mr. Holley met with various clubs and organizations in the area and displayed magazines and films depicting sexual portrayals of all types. These clubs included the Navy wives clubs, which included persons from various parts of the country (T. 14). During this investigation, Mr. Holley was not only able to determine what the community standard was, but also formed the opinion that the local standard was essentially the same as the national standard. His opinion concerning the national standard was based upon his travels on the East Coast and in talking with people from throughout the country (T. 15, 21, 23). Upon this background, Mr. Holley was considered as an expert witness and allowed by the Court to testify (T. 37). Mr. Holley testified that he had examined each of the books in question (T. 38), and that in his opinion the majority of the books were patently offensive and did not meet the community standard (T. 46).

Mr. Holley also testified that the books taken as a whole appealed to prurient interest in sex and the majority of the books did not have any redeeming social value (T. 46, 47). Mr. Holley did state that he did not consider nudity alone as violating the community standard, but that nude persons in suggestive poses depicting sexual intercourse or sodomy did violate the community standard (T. 57, 58).

The Commonwealth, next offered the testimony of Dr. Donald Lee Mingione. Dr. Mingione specializes in the field of psychiatry and has been practicing in Portsmouth for nine years (T. 60). Dr. Mingoine was qualified as an expert psychiatrist and was qualified to testify concerning social values (T. 67-70). Dr. Mingione testified that he had examined each of the books in question (T. 60) and in his opinion the majority, if not all of the books, appealed to the prurient interest (T. 64). He further testified that none of the books possessed any redeeming social value (T. 70).

The Commonwealth then introduced Richard Messenger who stated that he was the owner of Messenger Printing Company, had lived in Portsmouth for forty-three years and been in the printing business for twenty years (T. 81, 82). Mr. Messenger testified that he does printing for the Government and firms outside the State of Virginia and also receives bulletins concerning what is to be printed and not to be printed in the obscenity field. Mr. Messenger also testified that he had attended meetings with other printers and publishers to discuss standards of printing obscene materials (T. 83, 84). Mr. Messenger examined all of the books in question (T. 83) and in his opinion they would appeal to the prurient interest (T. 86).

The appellants offered the testimony of Dr. Wilbur Hammond, a resident of Arlington, Virginia, who is engaged

in the private practice of medicine, specializing in psychiatry (T. 111). Dr. Hammond spent about ten minutes looking at from fifteen to twenty of the books (T. 125-127) and gave his opinion that the books involved would not appeal to the prurient interest (T. 116). Dr. Hammond based his conclusion on the fact that he had shown similar magazines to his patients and fellow doctors at St. Elizabeth's Hospital (T. 117). Dr. Hammond further testified that there are only a few items that would be entirely without redeeming social value and that hard core pornography would have some redeeming social value (T. 128, 129).

Thereafter the appellants presented the testimony of Dr. Donald W. Nachand, a practicing psychologist, employed at the Eastern Shore State Hospital, in Cambridge, Maryland (T. 152), who was of the opinion that the books would not appeal to the prurient interest of the average individual (T. 154). Dr. Nachand testified that he had examined only approximately one-half of the books in question (T. 162). He further testified that he did not believe these books exceeded the community standards and that they probably had some socially redeeming value (T. 155-158). Dr. Nachand further testified that hard core pornography is not necessarily obscene (T. 185).

Dr. Herman Kastner, a psychiatrist engaged in private practice in the State of Maryland, testified that the books may appeal to the prurient interest of a group of people (T. 197). He further testified that he would not feel qualified to say what standards are relative to prurient interests for most people in that it differs from person to person and is an individual concept (T. 200-204). Dr. Kastner in answer to a question propounded by the Court, stated that the magazines might be considered obscene by a majority of the citizens (T. 207).

ARGUMENT

I.

Section 18.1-236.3 Of The Code Of Virginia Is Constitutional.

Petitioners first assert that § 18.1-236.3 (set forth in petitioners' petition Appendix pgs. 19a-21a), is unconstitutional in that it does not provide for trial by jury. Subsection 8 of this section specifically provides that the hearing shall be conducted by the court in accordance with the rules of civil procedure applicable to the trial of cases by the court without a jury.

Section 18.1-236.3 is not a criminal proceeding, but rather is an in rem proceeding. The petition is directed against the book or books considered to be obscene, and this section provides no criminal penalties. This proceeding is a creature of statute and was unknown at common law. It has long been well settled that neither the State nor Federal Constitution guarantees or preserves the right of trial by jury except in those cases where it existed when these constitutions were adopted. *Bowman* v. *Va. State Entomologist,* 128 Va. 351 (1920); 50 C.J.S., Juries § 10.

As a general rule, jury trials may be properly denied in purely statutory actions or proceedings. 47 Am. Jur. 2d, Jury, § 41.

Although the Supreme Court was not called upon to decide the issue of a jury trial in *Kingsley Books* v. *Brown,* 354 U.S. 436 (1957), it nevertheless approved a New York statute which set forth the procedure to enjoin the distribution of obscene books without the benefit of a jury trial. See also *Village Books, Inc.* v. *State's Attorney, Prince George's County,* 282 A.2d 126 (Md. 1971).

Petitioners next urge that the statute is unconstitutional in that it provides for a prior restraint without the benefit

of an adversary hearing. Subsection 5 provides that when an order to show cause is issued the court may issue a temporary restraining order against the sale or distribution of the book alleged to be obscene.

This Court in *Freedman* v. *Maryland,* 380 U.S. 51 reemphasized its previous holding that prior restraint is not necessarily unconstitutional under all circumstances.

In the recent case of *United States* v. *Thirty-Seven Photographs,* 402 U.S. 363 (1971), this Court had occasion to review its decision in *Freedman* as it applied to 19 USC § 1305 (a). In reviewing *Freedman,* this Court said it had struck down the state scheme for administrative licensing of motion pictures, holding "that, because only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint." 380 U.S. at 58. This Court countinued that to insure a judicial determination occurs promptly so that administrative delay does not in itself become a form of censorship, this Court further held, (1) there must be assurance, "by statute or authoritative judicial construction, that the censor will, within a specified brief period, either issue a license or go to court to restrain showing the film"; (2) "(a)ny restraint imposed in advance of a final judicial determination on the merits must similarly be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution"; and (3) ". . . the procedure must also assure a prompt final judicial decision." Id. at 58-59.

Section 18.1-236.3 provides for just the type of judicial determination in an adversary proceeding envisioned in *Freedman.* In addition, this section provides that any prior restraint to preserve the status quo will be for a short fixed

period. Subsection 5 provides that when a show cause order is issued and upon four days' notice the court may issue a temporary restraining order. Subsection 4 (d) requires that the show cause order be returnable 21 days after service. Subsection 8 provides that if appearance is entered and an answer filed, the court shall order the proceeding set on the calendar for a prompt hearing.

For other discussions concerning the question of prior restraint see Prior Adversary Hearings on the Question of Obscenity, 70 Colum. L. Rev. 1403 (1970); The Prior Adversary Hearing: Solution to Procedural Due Process Problems in Obscenity Seizures? 46 N.Y. U.L. Rev. 80 (1971).

Petitioners further contend that § 18.1-236.3 is unconstitutional in that it establishes an improper standard of measuring contemporary community standards. Petitioners argue that a nation standard should apply whereas the code section provides for a local standard. The question of national versus local standards was argued before this Court on January 19, 1972, in *Miller* v. *California,* No. 70-73, and this Court's decision in that case will be dispositive of this issue. The respondent believes that it would be impossible to set a national standard and a community standard is the proper standard. See *State* v. *Henry,* 198 So.2d 889 (La. 1967); *Dixon* v. *Municipal Court of San Francisco,* 72 Cal. Rptr. 587 (1968); and *Jones* v. *Birmingham,* 224 So.2d 922 (Ala. 1969), cert. den. 396 U.S. 1011.

Petitioners lastly argue that § 18.1-236.3 is unconstitutionally vague in that it provides for establishing scienter for use in a criminal prosecution without affording the defendant his constitutional right to a trial by jury on all issues of fact in a criminal case, and further that while the section provides for a temporary restraining order it does

not provide for a permanent injunction. In the first instance § 18.1-236.3 is a proceeding to determine whether specified books are obscene and does not conclusively establish knowledge or scienter. The question of knowledge or scienter in a criminal prosecution would still be an issue to be resolved by a jury, and the proceedings under § 18.1-236.3 are merely intended as an aid in that determination where thought to be useful or desirable.

In the second place, once books have been determined to be obscene they are not entitled to the protection of the Constitution, *Roth* v. *United States,* 354 U.S. 476; *United States* v. *Reidel,* 402 U.S. 351 (1971), and it would appear logical that their distribution could be permanently enjoined.

II.

The Books And Magazines Are Obscene In The Constitutional Sense.

The petitioners contend that the judgment of the Court below was contrary to the law and evidence, and reply mainly upon *Redrup* v. *New York,* 386 U.S. 767 in which they say that this Court reaffirmed the prior definition of obscenity in *Roth, supra,* and added three qualifications: (1) Protection of juveniles; (2) Assault upon individual privacy by publication in a manner so obstrusive as to make it impossible for an unwilling individual to avoid exposure to it; and (3) Pandering which was found in *Ginzburg.*

The Respondent submits that any such contention has been completely laid to rest, even if it ever had any validity.

In *United States* v. *Reidel, supra,* the defendant was charged with a violation of 18 USC § 1461, which prohibits the knowing use of the mails for the delivery of obscene matter. Reidel had advertised in the newspaper that a person seeking his illustrated booklet must be over 21 years of

age, and one of the booklets had been mailed to a postal inspector stipulated to be over 21. The District Court dismissed the indictment and concluded that § 1461 could not be constitutionally applied "where obscene material is not directed at children, or it is not directed at an unwilling public, where the material such as in this case is solicited by adults. . . ." This Court rejected the reasoning of the District Court and reversed the judgment. This Court held that *Roth* squarely placed obscenity and its distribution outside the reach of the First Amendment and refused to overrule *Roth*. This Court explicitedly held that whether the laws of obscenity should be limited to those situations where children are involved or where it is necessary to prevent imposition on unwilling recipients of whatever age was a legislative matter.

The Respondent submits that the Court below applied the proper standard for determining obscenity as set forth in *Roth* and that the evidence was ample to support the finding that the books and magazines were obscene.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Response of Respondent was mailed to Stanley M. Deitz, 1029 Vermont Avenue, N.W., Washington, D. C. 20005 on June 26, 1972.

JAMES E. KULP

Assistant Attorney General